STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WARDELL DONALD THOMPSON,

Defendant-Appellant.

UNPUBLISHED
August 26, 2003

No. 238491
Jackson Circuit Court
LC No. 01-004902-FH

Before: Hoekstra, P.J., and Sawyer and Zahra, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v), and use of cocaine, MCL 333.7404(2)(a). He was sentenced as a fourth-felony offender on the possession conviction to two to five years in prison and to 180 days in jail on the use conviction, the sentences to be served concurrently. He now appeals and we affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E)(1)(b).

Defendant first argues that there was insufficient evidence to establish the use of cocaine charge. We disagree. We review a claim of insufficiency of the evidence by looking at the evidence in the light most favorable to the prosecutor and determining whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992). In the case at bar, defendant admitted during his own testimony that he used the cocaine. Defendant argues that this was insufficient because the prosecutor failed to present evidence of use during the prosecutor's case-in-chief. We disagree. First, a conviction may be based upon testimony given by a defense witness. See *People v Riley*, 465 Mich 442; 636 NW2d 514 (2001). Second, the use charge was not added until after the prosecutor rested and then it was added at defendant's request[1]. We will not now entertain the argument that error was created by granting defendant's request to add the use charge.

[1] At the close of the prosecutor's proofs, defendant moved for a directed verdict on the possession charge, the only charge defendant was facing at that moment, and argued that the case should proceed on a charge of use of cocaine only. The trial court denied the motion for directed verdict, concluding that there was sufficient evidence of possession. Because defense counsel indicated that he would not be presenting any witnesses, the court proceeded to considering
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Next, defendant argues that he was denied the effective assistance of counsel by counsel's failure to challenge the validity of the initial traffic stop. We disagree. The standard of review for ineffective assistance of counsel claims was set forth by the Supreme Court in *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001):

> A defendant seeking a new trial on the ground that trial counsel was ineffective bears a heavy burden. To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment." *Strickland, supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* at 690. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Officer Garcia testified that he observed defendant driving and that defendant was known to him and that he knew defendant's driver's license was suspended. Additionally, defendant had something dangling from the rearview mirror, obstructing his vision. For those two reasons, Officer Garcia stopped defendant. During the stop, Officer Garcia requested defendant's consent to search his person and the vehicle; defendant gave consent to search. The search revealed the cocaine.

Defendant does not dispute the accuracy of the grounds for the traffic stop nor that he gave consent to search. Rather, defendant argues that the officer's motivation for the stop was to conduct a search (as evidenced by the fact that defendant was never charged with the traffic offenses) and that there was no probable cause to conduct the search in connection with the traffic stop.

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instructions. Defendant requested an instruction on use. The trial court denied the request, noting, as defendant now argues, that there was no evidence of use. Defense counsel then indicated that he wished to present the testimony of his client to make a record on use, which occurred. After the defense rested, counsel again requested an instruction on use as a lesser-included offense. The trial court denied the request. Defendant then asked that use be added as a second count. The trial court reluctantly granted this request after the prosecutor stipulated to it.

With respect to the validity of the stop itself, defendant makes no showing that the stop was, in fact, a pretext for a search. The mere fact that the officer, after discovering a significantly greater offense (possession of cocaine), lost interest in the minor offenses for which defendant was stopped does not establish that the stop was a pretext. Second, even assuming that Officer Garcia's primary motivation in making the traffic stop was the desire for it to turn into something greater does not negate the validity of the stop itself. In short, if the traffic stop is legally justifiable, it does not violate the Fourth Amendment. *People v Marcus Davis*, 250 Mich App 357, 363; 649 NW2d 94 (2002).

As for defendant's argument that there was no reason to conduct the search in connection with a traffic stop, we are not aware of any authority for the proposition that a police officer needs probable cause to request consent to search. Having validly stopped defendant, Officer Garcia was free to request permission to search. While it may be true that a search may have been invalid without that consent being given,[2] consent was given, thus validating the search.

In short, defendant does not show how trial counsel could have established that the traffic stop itself was unlawful or that the subsequent consent to search was invalidly obtained. Accordingly, a motion to suppress would have been unsuccessful. Thus, defendant cannot show that he was prejudiced by trial counsel's failure to bring a motion to suppress. As a result, defendant's argument that he was denied the effective assistance of counsel is without merit.

Defendant next argues that the trial court erred in denying his request for the instruction on use of cocaine to be given as a lesser-included offense to the possession charge (rather than as a second, additional charge as was actually done in this case). We disagree. Because the offense of use of cocaine contains an element (use) not found in the greater offense of possession of cocaine, use is a cognate lesser-included offense and a defendant is not entitled to an instruction on a cognate lesser-included offense. *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002). Accordingly, the trial court did not err in declining to give the use instruction as a lesser-included offense instruction to the possession charge.

Next, defendant argues that his convictions for both possession and use constitute double jeopardy. However, defendant waived this issue inasmuch as he requested that the use charge be added as a second count. *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999) ("error requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence").

Defendant next argues that the trial court erred by failing to respond to his objection to the fact there were no African-Americans in the jury pool. First, defendant failed to preserve this issue for appellate review by raising an objection at trial before the jury was impaneled and sworn.[3] *People v Hubbard (After Remand)*, 217 Mich App 459, 465; 552 NW2d 493 (1996). Second, even assuming that his untimely objection was adequate to preserve the issue, defendant has made no showing that there was a systemic underrepresentation of African-Americans from

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[2] Though, presumably, Officer Garcia could have arrested defendant for driving on a suspended license and then conducted a search subsequent to arrest.

[3] Although defendant did object at trial, he did so after the jury was sworn.

the Jackson County Circuit Court jury pool. *People v Smith*, 463 Mich 199, 205-206; 615 NW2d 1 (2000). Accordingly, this argument is without merit.

Finally, defendant argues that his sentence of two to fifteen years in prison on the possession conviction was excessive. However, that sentence was within the sentencing guidelines' recommendation of a minimum sentence in the range of zero to thirty-four months. Accordingly, we have no authority to remand for resentencing. *People v Leversee*, 243 Mich App 337, 348; 622 NW2d 325 (2000).[4]

Affirmed.

/s/ Joel P. Hoekstra
/s/ David H. Sawyer
/s/ Brian K. Zahra

[4] Although defendant refers to his sentence as constituting cruel and unusual punishment, his argument is couched more in terms of the sentence imposed being disproportionate. In any event, to the extent that defendant does, in fact, raise a constitutional argument with respect to either the minimum or maximum sentences, he has failed to make the requisite showing to demonstrate a constitutional violation. See *People v Bullock*, 440 Mich 15; 485 NW2d 866 (1992).